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Federal Communications Commission

FCC 98-98

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DISPATCHED BY
Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's Ex Parte
Rules in Joint Board Proceedings

GC Docket No. 98-73

NOTICE OF PROPOSED RULE MAKING

Adopted: June 26, 1998

Released: June 30, 1998

Comment Date: [30 days after Federal Register publication]

Reply Date: [45 days after Federal Register publication]

By the Commission:

1. By this Notice, the Commission proposes to amend its ex parte rules to facilitate communications by the states in Joint Board proceedings and proceedings before the Commission involving a recommendation from a Joint Board. In such proceedings, we propose to provide that ex parte presentations by state commissions, their members and their staffs to Joint Boards and the FCC must be disclosed only if of substantial significance and clearly intended to affect the ultimate decision. We tentatively conclude that such a modified approach would facilitate the congressional goal of federal-state cooperation underlying sections 254 and 410 of the Communications Act. We seek comment by the states and other interested persons on this proposal.

I. BACKGROUND

2. The provisions of the Communications Act recognize the strong public interest in the cooperation of the FCC and the states in deciding questions relating to common carriers. Section 410(c) of the Act, 47 U.S.C. § 410(c), requires the establishment of Federal-State Joint Boards with respect to any matter concerning jurisdictional separations of common carrier property, and, with the exception of adjudications designated for hearing, allows the Commission to refer to a Joint Board any other matter relating to common carrier communications of joint federal-state concern. See also 47 U.S.C. § 410(a). Joint Boards established under this provision consist of three members of the FCC and four state Commissioners nominated by the National Association of Regulatory Utilities Commissioners (NARUC)

and approved by the Commission. They are empowered to issue recommended decisions for review and action by the Commission. Recently, Joint Boards have played a key role in deciding crucial public policy issues regarding common carriers. As a notable example, the Telecommunications Act of 1996 amends the Act to mandate the establishment of a Joint Board to recommend regulations implementing the provision of universal service under sections 254 and 214(e) of the Act.¹ 47 U.S.C. §§ 254, 214(e). See Report and Order in CC Docket 96-45, 12 FCC Rcd 8776 (1997) (subsequent history omitted). See also Recommended Decision in CC Docket 96-45, 12 FCC Rcd 87 (1996).

3. Joint Boards are subject to the Commission's ex parte rules (47 C.F.R. § 1.1200 et seq.), which are intended to ensure fairness in Commission proceedings. See generally Report and Order in GC Docket No. 95-21, 12 FCC Rcd 7348 (1997), pet. recon. pending. Under these rules, Joint Board proceedings and proceedings before the Commission involving a recommendation from a Joint Board are classified as "permit-but-disclose." 47 C.F.R. § 1.1206(a)(8). Ex parte presentations to decisionmakers are permissible but must be disclosed on the record in accordance with the procedures set forth in the rules. 47 C.F.R. § 1.1206(a). Accordingly, all persons, including the states, must file copies of written ex parte presentations² to Joint Boards or the Commission for inclusion in the record and must file memoranda of new arguments or data contained in oral ex parte presentations.³

4. State members of a Joint Board are, of course, decision-makers in the Joint Board proceeding. Given their statutory right to participate (but not vote) on the Commission's deliberations on a recommended decision from the Joint Board (47 U.S.C. § 410(c)), they are also decision-makers with respect to the Commission's actions as well. Thus, conversations between an FCC Commissioner and a state Commissioner on the Joint Board are not governed by the restrictions in the ex parte rules and, as a consequence, are not summarized for the record, while those between an FCC Commissioner and a state Commissioner not on the Joint Board are.

II. DISCUSSION

5. The Commission has long recognized that in some circumstances the public interest is best served by treating certain presentations differently under its ex parte rules. Thus, for example, over the past few decades, we have identified circumstances in which certain types of presentations are classified as exempt from the usual prohibitions and disclosure requirements of the rules. See 47 C.F.R. § 1.1204(a). Among these exempt presentations are those in which the presentation involves a private land mobile frequency coordinator, another agency with shared jurisdiction or the United States Department of Justice or Federal Trade Commission and involves a telecommunications matter in a proceeding which has not been designated for hearing and in which the relevant agency is not a party. In the case of the third exemption mentioned, for example, we found that the exemption furthered the public interest by facilitating inter-agency coordination that leads to effective, expedited, and consistent enforcement of the laws relating to telecommunications competition. 47 C.F.R. § 1.1204(a)(6). See 12 FCC Rcd at 7367-68

¹ The Universal Service Joint Board has, in addition to the members required by 47 U.S.C. § 410(c), a state-appointed utility consumer advocate, nominated by NARUC. See 47 U.S.C. § 254(a)(1).

² 47 C.F.R. § 1.1206(b)(1). Written ex parte presentations are written communications directed to the merits or outcome of a proceeding that are not served on all parties to the proceeding. 47 C.F.R. § 1.1202(b)(1).

³ 47 C.F.R. § 1.1206(b)(2). Oral ex parte presentations are oral communications directed to the merits or outcome of a proceeding that are made without giving advance notice to the parties and an opportunity for them to be present. 47 C.F.R. § 1.1202(b)(2).

¶¶ 60-62. More recently, we have exempted from our general ex parte requirements any oral ex parte presentations from the Department of Justice or the relevant state commission in our section 271 proceedings. Any new factual information obtained through such exempt presentations upon which the Commission relies in our decisionmaking process must, however, be disclosed in the record no later than the time the decision is released. See Public Notice, Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act, FCC 97-330 (Sept. 19, 1997) at 9. The Commission has also provided for different treatment in certain circumstances for ex parte presentations from Congress or the Executive Branch. Such presentations must be disclosed only if they "are of substantial significance and clearly intended to affect the ultimate decision." See 47 C.F.R. §§ 1.1203(a)(4); 1.1206(b)(3).

6. We believe that section 410(c) of the Act reflects a strong congressional policy favoring close federal-state cooperation on matters within its scope. See also 47 U.S.C. § 254. Indeed, in the context of our section 254 universal service proceeding relating to continued implementation of the Joint Board's recommendations, many Members of Congress have indicated their desire that we increase the degree of our cooperation with the states. Many state Commissioners have suggested that one way to contribute to our continuing efforts to increase such cooperation is to consider modified treatment of the states under our ex parte rules in Joint Board proceedings. We believe such suggestions have merit, and we pursue them here.

7. We tentatively conclude that Joint Board proceedings and proceedings before the Commission involving a recommendation from a Joint Board represent another situation in which modified treatment under our ex parte rules is appropriate. The composition of Joint Boards is intended to facilitate the cooperation of the states and the FCC in the deliberative process leading to the issuance of a recommended decision. In Joint Board proceedings and proceedings before the Commission involving a recommendation from a Joint Board, we believe that the public interest served by this joint federal-state decisionmaking would be further enhanced by allowing appropriate persons from individual states somewhat more freedom to communicate informally with the Joint Board and the Commission. Specifically, as with Congress and the Executive Branch, we propose that presentations from state commissions, their members, and their staffs in Joint Board proceedings only be required to be disclosed if they are of substantial significance and clearly intended to affect the ultimate decision. This will allow the states a greater opportunity, for example, to discuss issues informally with the Commission and state Joint Board members and staff and thus will lead to a deeper, more vigorous level of federal-state cooperation. These states may also elect to participate in the process by filing formal comments, but the proceedings involved are policy-oriented rulemakings, rather than the kind of adjudicatory proceedings in which the significance of party status would be more pronounced. See Sierra Club v. Costle, 657 F.2d 298, 400, n.501 (D.C. Cir. 1981) (rulemakings technically involve "interested persons" rather than "parties," making ex parte concerns less significant than in adjudications). Moreover, states participating in these proceedings participate as other public agencies grappling with the complex policy and statutory interpretation issues. We therefore propose to amend the ex parte rules to provide that, in Joint Board proceedings and proceedings before the Commission involving a recommendation from a Joint Board, presentations by individual state commissions (as defined by 47 U.S.C. § 153(41), their members and their staffs to Joint Boards or the Commission would be required to be disclosed only if they are of substantial significance and clearly intended to affect the ultimate decision. We tentatively conclude that this proposal will further our goal of closer federal-state cooperation in Joint Board proceedings, a goal we believe is shared by the states and Congress, while preserving the fairness of Joint Board proceedings.

8. The Commission therefore invites the states and other interested persons to comment on the following question: should the ex parte rules for Joint Board proceedings and proceedings before the Commission involving a recommendation from a Joint Board be modified to provide that those

presentations made by states to Joint Boards or the Commission (or their respective staffs) must be disclosed only if they are of substantial significance and clearly intended to affect the ultimate decision?

III. PROCEDURAL MATTERS

A. Ex Parte Rules -- Permit-but Disclose Proceeding

9. This is a permit-but-disclose notice-and-comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda Period, provided they are disclosed as set forth in 47 C.F.R. § 1.1206(b).

B. Regulatory Flexibility Certification

10. Section 603 of the Regulatory Flexibility Act, as amended, requires a final regulatory flexibility analysis in a notice and comment rulemaking proceeding unless we certify that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). We believe that the rule we propose today will not have a significant economic impact on a substantial number of small entities.

11. As noted above, our purpose in proposing to modify the ex parte rules is to facilitate the participation of states in Joint Board proceedings and proceedings before the Commission involving a recommendation from a Joint Board. The proposed rule does not impose any additional compliance burden on persons dealing with the Commission, including small entities. The new rule would reduce the reporting requirement applicable to the states under the current rules and would not otherwise affect the rights of persons participating in Commission proceedings. There is no reason to believe that operation of the new rule would impose any costs on parties to Commission proceedings.

12. Accordingly, we certify, pursuant to Section 605(b) of the Regulatory Flexibility Act, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996), that the rules will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. § 605(b). The Commission shall send a copy of this Notice of Proposed rulemaking, including this certification, to the Chief Counsel for Advocacy of the SBA. 5 U.S.C. § 605(b). A copy of this certification will also be published in the Federal Register. *Id.*

C. Authority

13. Authority for this rulemaking is contained in 47 U.S.C. §§ 154(i), 154(j), 303(r), 403.

IV. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED, That NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

15. IT IS FURTHER ORDERED, That pursuant to applicable procedures set forth in 47 C.F.R. §§ 1.415 and 1.419, comments SHALL BE FILED on or before [30 days after Federal Register publication and reply comments SHALL BE FILED on or before [45 days after Federal Register publication]. To file formally in this proceeding, commenters must file an original and four copies of all comments, reply comments, and supporting comments. If commenters want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply

comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters should file a copy of any such pleadings with the Office of General Counsel, Room 610, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554. Copies of filings may be purchased from the Commission's copy contractor, International Transcription Service, Suite 140, 2100 M Street, N.W., Washington, D.C. 20037, telephone (202) 857-3800.

16. For further information, contact David S. Senzel, (202) 418-1720, Office of General Counsel.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX**Proposed Rule Change**

Part 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1 -- PRACTICE AND PROCEDURE

1. The authority citation for Part I continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 154, 303, and 309(j) unless otherwise noted.

2. Section 1.1206 is amended to read as follows:

§ 1.1206 Permit-but-disclose proceedings

(a) * * * *

(8) A proceeding before a Joint Board, a proceeding before the Commission involving a recommendation from a Joint Board or a proceeding before the Commission involving further actions that may be required in any such proceeding;

(b) * * * *

(3) Notwithstanding paragraphs (b)(1) and (b)(2) of this section, in permit-but-disclose proceedings presentations made by members of Congress or their staffs or by an agency or branch of the Federal Government or its staff shall be treated as ex parte presentations only if the presentations are of substantial significance and clearly intended to affect the ultimate decision. In proceedings before a Joint Board, proceedings before the Commission involving a recommendation from a Joint Board or proceedings before the Commission involving further actions that may be required in any such proceeding, presentations from a state commission, one or more of its members or its staff regarding the proceeding shall be treated as ex parte presentations only if the presentations are of substantial significance and clearly intended to affect the ultimate decision. The Commission staff shall prepare a written summary of such oral presentations covered by this subparagraph and place them in the record in accordance with paragraph (b)(2) of this section and place such written presentations covered by this subparagraph in the record in accordance with paragraph (b)(1) of this section).